THE FIRM OF T. AR. CT.
v.
THE FIRM OF S.N.S.AR.N.

[C. A. (Mathew, C.J., Brown, Ag. C.J. (S), Pretheroe, J.) December 24, 1953]

[Penang — Civil Appeal No. 22 of 1953]

Practice — Writ — Service — Service after expiration of twelve months — Discretion of Court to extend time for service — Limitation — Period of Limitation applicable to Thavanai letters — Limitation Ordinance Arts. 41 & 42.

The Court ought not to exercise its discretion to renew a writ when the renewal would deprive a defendant of the benefit of a plea of limitation which had accrued.

Judgment of Buhagiar, J. reported in (1953) M.L.J. 172 affirmed.

Cases referred to:—

(1) *Rameshwar Mandal v. Ram Chand Roy & Anor.* I.L.R. 10 Cal. 1033.

(2) *Brojo Lal v. Budh Nath Pyarilal & Co.* I.L.R. 55 Cal. 551.

(3) *Ramasami v. Muthusami & Anor.* I.L.R. 15 Madras 380.

(4) *Kwong Yik (Selangor) Banking Corporation Ltd. v. The Malayan Daily Express (1926) Ltd. & Anor.* (1933) M.L.J. 198.

(5) *N. N. Sockalingam Chettiar v. A. R. S. P. Palaniappa Chettiar* (1934) S.S.L.R. 269; (1935) M.L.J. 74. (C.A.); (1935) S.S.L.R. 70 (C.A.).

(6) *Battersby v. Anglo-American Oil Co. Ltd.* (1945) K.B. 23.

(7) *Chellappa v. Subramaniam* (1918) M.W.N. 564.

(8) *Sheldon v. Brown Bayley's Steel Works Ltd. & Dawnays Ltd.* (1953) 3 W.L.R.S. 42.

APPEAL to the Court of Appeal from the Judgment of Buhagiar J. reported at (1953) M.L.J. 172.

F. G. Pooley for the appellants.

R. D. Hume for the respondents.

Cur. Adv. Vult.

Mathew, C.J. :—In the above mentioned civil suit* a specially endorsed writ was issued on 21st December, 1951 in respect of a claim on a Thavanai Letter for $3,000 on a date in the Hindu calendar which corresponds to 2nd July, 1941. The amount became payable on the 2nd of October, 1941 with interest at an agreed rate.

The writ was served on the defendants on 15th January, 1953 after it had expired. On 16th January, 1953 the defendants entered a conditional appearance without prejudice to the application to set aside the said writ and the service thereof.

By an order dated the 6th of February, 1953 the service of the 15th day of January 1953 of the writ of summons was set aside on the ground that the writ was served after the expiration of 12 months from the date of the said writ.

On 30th January, 1953 the plaintiffs applied *ex parte* that the writ should be renewed for a period of six months, and that the time for the making of that application be enlarged. An order giving effect to this application was made on the 6th of February 1953 by Spenser Wilkinson, J. On the 1st of June 1953 Buhagiar, J. set aside the order of the 6th February 1953.

Against this decision the plaintiffs appealed, and two questions have been put to this Court for decision :—

(1) Whether at the time the writ was renewed the claim was capable of being defeated on a plea of limitation.

(2) Should the Court in the special circumstances of the case have exercised its discretion and refused to renew the writ.

The answer to the first question depends entirely on which article in the Schedule of the Limitation Ordinance should be applied to a claim arising on a Thavanai Letter.

Mr. Pooley for the appellants argued that articles 41 and 42 which read :—

"41.	For money lent under an agreement that it shall be payable on demand.	Three years.	When the loan is made.
42.	For money deposited under an agreement that it shall be payable on demand.	—do.—	When the demand is made."

were only applicable where the money lent or deposited could be demanded *at any time*, and that on a Thavanai Letter the repayment of the deposit could not be demanded until the expiration of 3 months from the date of the deposit. In his submission article 95 applied. This article reads :—

"For compensation for the breach of a contract in writing.	Six years.	When the period of limitation would begin to run against a suit brought on a similar contract not in writing."

The transaction, the subject of this suit, was in his view not a case of a simple deposit but a contract with special provisions attached to it. The special provisions flowed from the words in the Thavanai Letter. "To pay according to Thavanai" implied a number of special provisions e.g. an implied understanding that interest should be calculated at an agreed rate with

* Penang — Civil Suit No. 255 of 1951.

quarterly rests, and that on repayment the Thavanai Letter should be handed back suitably endorsed.

He cited *Rustomji on Limitation* (5th ed.), page 725:—

"**Loan Repayable at specified time:**— Though on a mere loan of money, time commences from the date of the loan (articles 57 and 59), yet where money is lent on a special contract (whether oral or written) for repayment, it is the time of the repayment that fixes the period of limitation, and accordingly limitation in such a case would run (under article 115) from the day fixed for repayment."

In support of this he quoted the head-note to *Rameshwar Mandal v. Ram Chand Roy and Anor.*[1], reading:—

"A suit to recover money lent with interest upon a verbal agreement that the loan should be repaid with interest within one year from the date of the loan, is governed by art. 115 of Sch. II of Act XV of 1877, which virtually provides for all contracts, which are not in writing, registered, and not otherwise specifically provided for."

In that case Garth, C.J. in the course of his opinion said (p. 1034):—

"The suit is not for money lent in the ordinary sense of that expression; it is not for a loan repayable at once, or, what is the same thing in point of law, repayable on demand. Articles 57 and 59 of the Limitation Act are only applicable, in my opinion, to cases of that kind.

The contract here set up by the plaintiff is one of a special nature. In consideration of a present advance by him, the defendant is said to have agreed to repay the money at the end of a year with interest.

This being the contract it is clear that the plaintiff would have no right of suit until the expiration of the year; and therefore it would seem obviously unjust, and contrary to the meaning of the Limitation Act, that limitation should run, not from the time when the plaintiff's right of action accrued, but from the time when the advance was made, which was the consideration for the defendant's promise.

Suppose that by a contract of this nature, instead of the money being repayable at the end of one year, it were repayable at the end of four years. It is clear, that if the Munsif were right in his construction of article 57, the plaintiff, however honest and bona fide his bargain may have been would never have a right to enforce it, because by the time when his right to sue accrued, it would be barred by limitation."

(Articles 115 and 60 under the Indian Limitation Act correspond to our articles 94 and 42 respectively.)

This decision was followed in *Brojo Lal v. Budh Nath Pyarilal & Co.*[2] and again in *Ramasami v. Muthusami & Anor.*[3].

The reason for not applying our article 41 in these cases is clear. It would, as Garth, C.J. points out, be obviously unjust if the period of limitation were to run, as it must, under the article, from the date when the loan was made. These authorities are not in my view relevant in the consideration of the present case.

Mr. Hume has submitted that recourse to article 95 can only be made when there is no specific article into which the transaction under consideration can be fitted, and he cites in support of this the judgment of Whitley, J. in *Kwong Yik (Selangor) Banking Corporation Ltd. v. The Malayan Daily Express (1926) Ltd. & Anor.*[4], and submits that on the facts of the present case article 42 is clearly applicable. He points out that if Mr. Pooley's submission is correct, then all the contracts in writing come within the purview of article 95 which cannot be so in view of the many express articles which can be found in Part III of the Schedule to the Ordinance.

He cited in support of his submission that article 42 applied: *N. N. Sockalingam Chettiar v. A. R. S. P. Palaniappa Chettiar*[5]; Mr. Pooley has submitted that this case is not relevant, as it applies to a simple account and not to a Thavanai Letter. But on reference to the head-note on the report of the original suit *N. N. Sockalingham Chettiar v. A. R. S. P. Palaniappa Chettiar*[5], one finds:—

"Where two different sums of money were placed in the hands of a Chettiar banker, one on deposit ('Thavanai') and the other on current account, on the terms that in the first case the money should be repayable on demand at any time after the expiry of the first 3 months from the date of the deposit, and that in the other case the amount should be repayable on demand, in a suit for the recovery of both amounts, long after the expiry of the first 3 months of the deposit account."

In that case a similar transaction to the one in the present case was held to come within the purview of article 42.

There are a number of Indian authorities to which reference is made in *Mitra on the Indian Limitation Act* (11th ed.), but I do not consider it necessary, in view of the decision in *N. N. Sockalingam Chettiar v. A. R. S. P. Palaniappa Chettiar*[5], *supra* to consider them. I would only say that in the same author's work in the 7th edition, the commentary contains, under article 57, the following:—

"**Thavanai Accounts:** A suit for money lent on a Thavanai account is governed by article 60 and not by this article. See notes under article 60."

In my view, the learned judge was right in holding that the transaction in this suit came within the purview of article 42 and not article 95.

I now come to Mr. Pooley's second submission: ought the Court have renewed the writ. Mr. Pooley has submitted that the English authorities are not applicable to this case, as there are two main differences between the law applicable here and in the United Kingdom:—

1. All writs in this country have to be served by a Court process server, whereas in England they are served by the parties themselves.
2. The Limitation Ordinance only applies here if limitation is set up as a defence in the pleadings.

Mr. Pooley has submitted that the failure to serve the writ before it expired was caused by the dilatoriness of the process-server and by his being given inaccurate

information that the writ had been renewed which in fact it had not. In these circumstances, the judge should have exercised his discretion in favour of the appellants and renewed the writ and, as he did not, this Court should.

Considerable delay in the service of the writ was occasioned by the plaintiffs' agent who have instructions that the service of the writ was not to be proceeded with pending the decision of the Court of Appeal in another suit. In fact, the service of the writ was delayed for 9½ months.

In my view, the defendants had no opportunity of raising the question of limitation until they applied to have the *ex parte* order for the renewal of the writ set aside. So soon as the question of limitation was raised, the judge hearing the application had to consider whether the renewal of the writ and the enlargement of time would have the effect of depriving the defendants of a statutory defence. He applied the principles laid down in *Battersby v. Anglo-American Oil Co. Ltd.*[6], and came to the conclusion, rightly in my view, that he should exercise his discretion not to renew the writ and enlarge the time, as to do otherwise would deprive the defendants of a legal defence.

I would dismiss the appeal with costs, and order that the deposit be paid out to the respondents against their costs.

Brown, Ag. C.J. (S.) : — The two questions in this appeal are, firstly, whether at the time when the writ was renewed on the 6th February 1953 the claim of the plaintiffs was capable of being defeated by the defence of limitation; and secondly, if so, ought the Court to have exercised its discretion to renew the writ

The claim was on a Thavanai letter dated the 2nd of July 1941, and the statement of claim states that the amount was payable on the 2nd of October 1941. In paragraph 7 of the affidavit of the defendants' attorney dated 7th May 1953 it is agreed that the amount was repayable on the 2nd of October 1941. It could have been repaid on demand at any time thereafter; and in the same paragraph the defendants alleged that the right of action was now statute-barred. It was at no time disputed, either by way of affidavit or in the proceedings below, that a demand had been made and that if Article 42 of the Schedule to the Limitation Ordinance applied the claim was statute-barred. For this reason we refused to allow an application which was made at the commencement of the hearing of this appeal to substitute a new ground for Ground I that the learned Judge was wrong in law in holding that the plaintiffs claim was barred under item 42 of the Schedule to the Limitation Ordinance on the 2nd October 1952 "because there is no evidence that any demand for payment had been made on 2nd October 1949 or on any other date prior to the service of the writ."

Mr. Pooley, on behalf of the appellants, urged that Articles 41 and 42 of the Schedule to the Limitation Ordinance were not applicable to the case because they only apply when the money which is lent or deposited is repayable on demand. He said that in order to come under either of those two articles the money must be repayable on demand *at any time,* and the fact that during 3 months, from 2nd July to 2nd October 1941, it was not repayable precluded it from coming under either of the items. But in the case of *N. N. Sockalingam Chettiar v. A. R. S. P. Palaniappa Chettiar*[5] the account started as a deposit account, which (as in the present case) continued for 3 months, and it was held that Article 42 applied. And in *Mitra's Indian Limitation Act* (11th Edition) at page 438 (para. 362) the case of *Chellappa v. Subramaniam*[7] is referred to as authority for saying that in such a case the suit is governed by Article 60 (which is our Article 42), because the fact that the money is to be paid after the expiry of a fixed period does not make it any less a deposit payable on demand within the meaning of Article 60. Mr. Pooley lays stress upon the fact that this is a contract in writing and says that under our Ordinance every contract in writing is governed by Article 95 unless it is otherwise specifically provided. But Article 95 is a general article, and recourse should only be had to it if no other Article can apply. Holding as I do, upon the authorities which I have referred to, that the money in question was payable on demand, it seems to me that Article 42 must apply to it and that the period of limitation is 3 years from the time when the demand was made — in the present case 3 years from the date when the Moratorium Proclamation (Repeal) Ordinance came into force — and that such period expired on 2nd October 1952.

The remaining question is whether the Court ought to have exercised its discretion to renew the writ. Mr. Pooley has pointed out that in this country all writs are served by the process server, and that the plaintiff had no power to effect process himself. There is, however, the statement in paragraph 2 of the affidavit of Kumarappa Chettiar, the plaintiffs' agent, sworn on the 22nd January 1953 that service was not proceeded with when the writ was first issued pending the decision of the Court of Appeal in another suit. Nevertheless, in considering this question, it seems to me that whether there were good reasons to excuse the delay in service

or not, the reason why this writ should not be renewed is that the defendants would thereby be deprived of their defence of limitation; and I think the learned Judge was right in following the decision in *Battersby v. Anglo-American Oil Co. Ltd.*[6]. It was argued that that decision ought not to have any application here because the law here is not the same as in England and by section 3 of the Limitation Ordinance limitation is only a defence if it is pleaded. But in the present case the defendants have had no opportunity to plead it because the suit had not reached the stage of pleading, and to allow a renewal of the writ will prejudice their right to plead it. Our attention was drawn to the case of *Sheldon v. Brown Bayley's Steel Works Ltd. & Dawnays Ltd.*[8], in which a dictum of Goddard, L.J. in *Battersby's* case to the effect that a writ which had not been served within twelve months was a nullity was not approved. But that is not the question here. Nor was it necessary for the decision in *Battersby's* case. The question here is the same as in *Battersby's* case—namely, whether the Court ought to exercise its discretion to renew a writ when the renewal would deprive a defendant of the benefit of a plea of limitation which had accrued. I can see no reason why the principle of *Battersby's* case should not apply to the present case, and I would dismiss this appeal with costs.

Pretheroe, J. : —In this appeal I have had the advantage of reading the judgment prepared by the learned Chief Justice of Singapore. I am in complete agreement with that judgment and have nothing to add thereto.

Appeal dismissed.

Solicitors for the appellants : *Presgrave & Matthews.*
Solicitors for the respondents : *Hogan, Adams & Allan.*

Re OTHMAN BIN ABU BAKAR, Ex parte OFFICIAL ASSIGNEE.

[O. C. J. (Buhagiar, J.) December 29, 1953]

[Johore Bahru — Muar Bankruptcy No. 9 of 1936]

Bankruptcy Enactment — Subsequent bankruptcy — Administration of — After-acquired property.

Receiving and Adjudication Orders were made against the bankrupt in 1936 and before he obtained his discharge in that bankruptcy, subsequent Receiving and Adjudication Orders were made in 1953. The point for consideration was the manner in which the two bankruptcies were to be administered.

Held: the two bankruptcies must be administered separately. Any property acquired by the bankrupt since the first adjudication must be treated as assets in the first bankruptcy and cannot go to the benefit of the creditors in the second bankruptcy until the creditors in the first bankruptcy have been paid in full or until the bankrupt has obtained a discharge in the first bankruptcy.

Cases referred to :—

(1) *Ex parte Watson, in Re Roberts* (1879) 12 Ch. D. 300.
(2) *Morgan v. Knight* (1864) 15 C.B.N.S. 669.
(3) *Re Betts, Ex parte Betts* (1897) 1 Q.B. 50.
(4) *Ex parte Beardmore, re Clark* (1894) 2 Q.B. 239.
(5) *Ex parte Ford* 1 Ch. D. 521..
(6) *In re Temple* (1947) Ch. 345.

BANKRUPTCY.

M. Rajendram, (Ag. A.O.A.) for the Official Assignee.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Buhagiar, J. : —Receiving and Adjudication Orders were made against Othman bin Abu Bakar (hereinafter referred to as the bankrupt) on the 3rd of May, 1936, the total liabilities disclosed in the Statement of Affairs amounted to $1,431.45 due to eighteen creditors; the only asset disclosed was a bicycle valued at $15. The bankrupt has paid instalments amounting to $634.63 since he was ordered by this Court on the 17th of January, 1937, to pay $5 per mensem for the benefit of his creditors. The bankrupt had not obtained his discharge when Receiving and Adjudication Orders were made against him on 22nd February, 1953, on his own petition.

On 1st December, 1953, the Official Assignee filed an application for directions asking whether :—

(a) The bankrupt could now apply for his discharge in the First Bankruptcy.

(b) The sums standing to the credit of the bankrupt in his account under the first Receiving Order could be paid out to the creditors and they be given liberty to prove in the Second Bankruptcy for any balances due to them.

(c) Alternatively, whether an order of discharge could be granted subject to a judgment being entered in favour of the Official Assignee in respect of the balance due to the creditors who proved under the First Bankruptcy after payment of further dividend, and whether the Official Assignee could be given permission to prove in the Second Bankruptcy in respect of the judgment.

The point for consideration is the manner in which the two bankruptcies are to be administered. An adjudication in bankruptcy is no bar to further bankruptcy proceedings, and a second or subsequent adjudication order may be made in respect of liabilities incurred after the date of the Receiving Order in the